19512

BeLKIN
GGM

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-124720 and B-129346 **DATE:** September 23, 1981

MATTER OF: Authority of General Accounting Office to Withhold Taxes on Backpay Judgments Against the United States

DIGEST: In certifying judgments against United States pursuant to 31 U.S.C. § 724a, we have no authority to withhold any taxes from backpay judgments against United States that specify a dollar amount unless judgments specifically directs such withholding or parties involved agree to deduction of specified amount of withholding tax. Although we agree that amounts awarded to employees as backpay do constitute taxable wages, we do not agree, and cases do not support, Internal Revenue Service contention that GAO may withhold money from backpay judgments that do not mention withholding. Since our authority to certify judgments against U.S. is largely ministerial, we cannot certify a judgment for payment other than strictly in accordance with its terms. B-124720/B-129346, August 1, 1961, affirmed.

The Commissioner of Internal Revenue asks that we reconsider and modify our decision (B-124720/B-129346, August 1, 1961) that this Office is "* * *without authority to deduct, or to direct the deduction of, any amount for income withholding tax from Court of Claims judgments for salary, unless, of course, the judgment should specifically so provide." Subsequently (in 44 Comp. Gen. 729 (1965)) we extended that opinion by holding that our office was similarly without authority to withhold social security taxes from Court of Claims judgments for backpay and allowances. (Although our Office has never issued a formal opinion with respect to our authority to withhold from judgments rendered by District Courts, such judgments are treated in essentially the same manner.)

Internal Revenue Service (IRS) considers wages to be taxable income subject to withholding tax, whether paid voluntarily, under a settlement agreement, or pursuant to a judgment. Furthermore, IRS believes that the responsibility of complying with the withholding tax requirements when backpay judgments are obtained against the United States rests with the General Accounting Office, since GAO "is responsible for certifying payment and is in control of the appropriated fund * * *" used to pay such judgments. (At our request, the Assistant Attorney General, Tax Division, Department of Justice, provided his views on this matter. He agrees generally with IRS.)

Having reconsidered this question, it remains our view that our decision of August 1, 1961, was essentially correct and that unless

116424
018644

a judgment specifically provides for withholding, or all of the parties agree to a specified amount of withholding, our Office has no authority to withhold income or social security taxes from any District Court or Court of Claims judgment against the United States for backpay or other remuneration for services.

The question of GAO's responsibility to withhold taxes from backpay judgments against the United States arises by reason of our authority under three different statutory provisions. Pursuant to 28 U.S.C. § 2414, District Court judgments against the United States are paid as follows:

> "Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court * * * against the United States shall be made on settlements by the General Accounting Office. * * * "

With respect to Court of Claims judgments against the United States, 28 U.S.C. § 2517(a) provides that:

> "Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court."

Although the language in these two sections differs, we view our "certification" function for judgments rendered by both the Court of Claims and district courts in essentially the same manner. This is largely due to the following language in 31 U.S.C. § 724a:

> "There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414, 2517 * * * of Title 28 * * * together with such interest and costs as may be specified in such judgments or otherwise authorized by law* * *."

When we considered the question of our authority to withhold income tax from Court of Claims judgments for salary in B-124720/B-129345, August 1, 1961, we justified our decision as follows:

> "Final judgments of the Court of Claims are paid on settlements of the General Accounting Office on presentation of a certification of the judgment by the clerk and chief judge of the court, as provided by section 2517(a) of the Judicial Code (28 U.S.C.). Except for the addition of interest in certain cases, as provided by 28 U.S.C. 2516(b) and section 1302 of the act of July 27, 1956, 70 Stat. 694, 31 U.S.C. 724a, and except for the withholding of an amount equal to a plaintiff's debt to the United States, in accordance with the procedures established by the act of March 3, 1875, as amended, 31 U.S.C. 227, we are not authorized to certify judgments for payment other than in accordance with their terms. United States v. O'Grady, 89 U.S. (22 Wall.) 641; Benedict v. United States, 66 Ct. Cl. 437. Consequently, we must hold that we are without authority to deduct, or to direct the deduction of, any amount for income withholding tax from Court of Claims judgments for salary, unless, of course, the judgment should specifically so provide."

In arguing that our decision in that case was incorrect, IRS maintains, among other contentions, that the decision's reliance on United States v. O'Grady and Benedict v. United States was misplaced. We do not agree. However, our holding in that decision and its reliance on O'Grady and Benedict may require fuller explanation. In our view, those cases stand for the proposition that, if a judgment against the United States is not appealed and becomes final, the judgment becomes "absolutely conclusive of the rights of the parties* * *." U.S. v. O'Grady, at 647. In other words, our Office has no authority to modify or otherwise refuse to certify a judgment for payment in accordance with its precise terms, even in a situation where the judgment itself is legally incorrect or requires payment of some amount that is otherwise prohibited by law. In essence, this is the basis of the Court's decision in Benedict, with respect to the plaintiff's right to receive interest as specified in the original judgment. The Court said:

> "Nor can we consider whether plaintiff, on the merits of the case, was entitled to the interest which the Federal courts awarded him. This matter is res adjudicata and neither the Comptroller General nor this court has any authority to review the decision."

Also see Higginson v. Schoeneman, 190 F.2d 32 (D.C. Cir. 1951).

Apart from the particular cases cited in our 1961 decision, the position expressed in that decision stems from our view of the judgment certification function as an essentially ministerial task. As early as 1916, the Comptroller of the Treasury, our predecessor, said that "* * *the officials of the Treasury Department have no power to amend, modify, or in any manner review or alter the findings or judgment of the court. Their duties with respect to such claims are purely ministerial, and consist of making the payments directed by the court* * *." 22 Comp. Dec. 520, 521 (1916). It follows that we have no authority to review the merits of a given judgment or to take unilateral administrative action to correct a real or perceived error. The following statement from a 1929 decision applies to all judgments:

> "If any error or omission has been made in the final judgment of the court * * * resulting unfavorably either to the Government or to the plaintiffs, it is the duty of the attorney concerned to apply to the court for correction or amendment of the judgment."

8 Comp. Gen. 603, 605 (1929). In other words, once a judgment is rendered, there are but two alternatives: contest it through normal judicial channels or comply with it as written.

The IRS urges us to hold that (as stated in the letter from the Tax Division of the Justice Department) the deduction of the appropriate amount of withholding tax from a backpay judgment for a specific dollar amount which does not provide for any withholding does not constitute "payment of a judgment other than in accordance with its terms." In this view, an employee who receives the amount of backpay specified in the judgment less an amount, not mentioned therein, that the employer is required to withhold at the time of such payment, pursuant to the withholding provisions of the Internal Revenue code, has received everything to which he is entitled under the judgment. In support of its view, IRS relies on numerous citations to court opinions and Revenue Rulings, as well as provisions in the Internal Revenue Code and Treasury Department Regulations. E.g., Keen v. Mid-Continent Petroleum Corp., 63 F. Supp. 120 (N.D. Iowa 1945), aff'd 157 F.2d 310 (8th Cir. 1946); Freeman v. Blake Co., 84 F. Supp. 700 (D. Mass. 1949); Smith v. Kingsport Press Inc., 263 F. Supp. 771 (D.C. Tenn. 1966). Also see Rev. Rul. 57-55, C.B. 1957-1 p. 304.

However, in our view the cases cited by IRS and the Justice Department do not stand for the proposition that the deduction of withholding tax from backpay judgments is required even if the judgment does not provide for any withholding. In essence, these cases all hold that a judgment against an employer representing an award of backpay or other compensation for services is taxable income subject to withholding. We agree completely with the conclusion in those decisions. In fact, we believe that this argument should be made to the court considering the case to insure that any judgment that is entered against the United States for payment of backpay will provide for withholding of the appropriate amount. We have been advised that this is often done. No problem arises of course, when the judgment does specifically provide for withholding.

The question involved here, however, concerns our authority, in the performance of our certification function, to order moneys to be withheld from a judgment that does not provide for any such withholding. The cases cited by IRS are not of much assistance in this respect since they involved judgments that did specifically provide for such withholding. If anything, these cases tend to support the contrary conclusion since it would be unnecessary for a judgment to specifically provide for withholding if, as urged by IRS, employers were required to deduct withholding tax from backpay judgments that were silent in that regard.

The case of Martin v. H.M.B. Construction Co., 279 F.2d 495 (5th Cir. 1960), cited by IRS, is especially interesting in this respect. In that case the District Court rendered a judgment for the plaintiff against his employer which included an award for overtime compensation under the Fair Labor Standards Act of 1938. Subsequently, the Court modified its judgment to provide that the award of overtime pay constituted wages subject to withholding tax as well as Federal Insurance Contributions Act tax, the combined total of which should be deducted from the amount payable to the plaintiff and paid instead to the United States. On appeal, the Court of Appeals affirmed the District Court's action, stating:

> "* * * Nor is it disputed that the employer was required to withhold as income tax the sum of $382.49, and as Federal Insurance Contributions Act tax the sum of $53.14. The district court had authority to modify the judgment so as to relieve the defendant, appellee, for '(6) any * * * reason justifying relief from the operation of the judgment.' Rule 60(b)(6), Federal Rules of Civil Procedure, 28 U.S.C.A. Such action of

> the district court will be reviewed only for abuse of discretion.* * * Not only was there no abuse of discretion but the action of the district court was proper." 279 F.2d at 496, footnote omitted.

Although IRS cited this case to support its position that a judgment for backpay should provide for withholding, which Martin does in fact stand for, the fact that the District Court felt compelled to modify its original judgment which was silent on the matter of withholding and was upheld in this respect by the Court of Appeals, demonstrates that unless a final judgment does specifically provide for withholding, an employer is without authority to withhold on his own initiative. Otherwise, if an employer could withhold from a backpay judgment that was silent on the question of withholding, there would have been no need for the District Court to modify its original judgment on the grounds that modification was necessary to relieve the defendant from the operation of the judgment. Furthermore, we are not aware of any Court decisions (either as a result of our own research or by reference to the IRS submission) in which the legal right of an employer to withhold from a judgment that did not specifically provide for withholding was considered and upheld.

The primary precedent relied upon by IRS is Otte v. United States, 419 U.S. 43 (1974). However, it is our view that this case does not support the IRS position. In Otte, the issue was "whether priority claims for wages earned by employees prior to an employer's bankruptcy, but unpaid at the inception of the bankruptcy proceeding, are subject to withholding taxes". The Supreme Court held as follows:

> "The fact that in bankruptcy payment of wage claims is effected by one other than the bankrupt former employer does not defeat any withholding requirement. Although § 3402(a) refers to the 'employer making payment of wages,' § 3401(d)(1), as also has been noted, provides that if the person for whom the services were performed 'does not have control of the payment of the wages for such services,' the term 'employer' then means 'the person having control of the payment of such wages.' This obviously was intended to place responsibility for withholding at the point of control. The petitioner trustee suggests that control rests in the referee rather than in the trustee* * *. We need not determine whether it is the trustee* * * or the referee, * * * or the estate, * * * that has 'control of the payment of such

> wages,' within the meaning of § 3401(d)(1) of the Internal Revenue Code. One of them is the 'employer,' and, as such, has the duty to withhold or to order the withholding, as the case may be. An employer under § 3402(a), is thus present." 419 U.S. at 50-51, footnote omitted.

One problem with applying Otte here is that the situations are not at all analogous. In Otte, the bankruptcy referee, at the trustee's request, ordered distribution of the bankrupt's assets to the various priority wage claimants without any deduction for Federal, State, or city withholding taxes. This order, however, was not allowed to stand unchallenged. The United States and the city petitioned the United States District Court to review the referee's order. The District Court reversed the referee's order and directed the withholding of Federal taxes on the priority wage claims. This decision was then appealed, first to the United States Court of Appeals and ultimately to the Supreme Court. Thus, in Otte the referee's order was not allowed to become final. That is precisely our point. If a judgment is entered against the United States for a specified amount of backpay without providing for any amounts to be withheld, the United States should either request that the judgment be modified, as in Martin, or failing that, should appeal the judgment before it becomes final.

Furthermore, before income tax could be withheld from a particular judgment, a determination would have to be made that the judgment represents taxable income subject to withholding. While this may be quite clear in many cases, it will be far from clear in many others. See, e.g., Hodge v. Commissioner, 64 T.C. 616 (1975). In any event, GAO has no authority to make this determination nor do we think our limited authority in the judgment area permits us to defer payment of judgments to obtain rulings from IRS. The time to resolve the issue of tax withholding is before the judgment is entered. If the parties agree, this should be a simple matter. If the parties disagree, then that disagreement would have to be resolved by the court and the time to do that is when the judgment itself is being considered, not after it has become final and has been submitted to GAO for payment.

Secondly, although we recognize, as stated in Otte, that for purposes of determining who is responsible for withholding federal income tax on employee wages, an employer is "the person having control of the payment of such wages", GAO does not in fact "control" payment of judgments against the United States. As noted, our responsibility under 31 U.S.C. § 724a to certify judgments rendered by the Court of Claims and district courts is largely ministerial. As stated above, we have no authority to deviate from the specific provisions of a judgment or

to assume that a final judgment's failure to provide for withholding was inadvertent or otherwise without any legal significance. Of course, if a backpay judgment does not specify a dollar amount, but directs the employing agency to make the necessary calculations, our Office would have no difficulty in issuing a settlement certificate for the net amount after withholding and other appropriate deductions, even though the judgment did not direct the agency to make those deductions. In such a case, we would not in fact be deviating from the specified terms of a judgment. However, even in these cases we will not issue a settlement certificate until we have received the claimant's written acceptance of the agency's computations. See 58 Comp. Gen. 311, 314 (1979). Similarly, if the parties (including, of course, the plaintiff) agree to the deduction of a specified amount of withholding tax from a backpay judgment that does not address the withholding issue, we would have no objection to implementing the agreement of the parties in this respect.

In accordance with the foregoing, we reaffirm our decision of August 1, 1961, and hold that we have no authority to withhold any taxes from backpay judgments of the Court of Claims or the district courts unless the judgment specifically provides for such withholding or the parties involved agree to the deduction of a specified amount of withholding tax.

Milton J. Socolar

Acting Comptroller General
of the United States